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ALEXANDER L. STEVAS,

No. 81-523

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

CONTAINER CORPORATION OF AMERICA,

Appellant,

v.

FRANCHISE TAX BOARD,

Appellee.

On Appeal from the Court of Appeal
of the State of California for the
First Appellate District

OPPOSITION TO APPELLANT'S MOTION TO NOTE PROBABLE JURISDICTION AND HEAR IN TANDEM WITH OTHER CASES

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TABLE OF AUTHORITIES CITED

Cases

	Pages
Federal:	
Mobil Oil Co. v. Vermont (19800 445 U.S. 425	9,10

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On Friday, November 13, 1981, counsel for appellee (FTB) received Appellant's ("CCA'S") "Motion to Note Probable Jurisdiction and to Hear Case in Tandem with Chicago Bridge & Iron, Asarco and Woolworth Cases." The Clerk of this court was immediately advised by telephone of FTB'S opposition. The Clerk advised counsel that the Court would

consider this case on November 25 and opposition (in typewritten form) should reach the court by Wednesday November 18, 1981.

Appellee Franchise Tax Board OPPOSES appellant Container Corporation's motion for the reasons stated hereinafter, as well as those contained in FTB'S "Motion of Appellee to Dismiss or Affirm" filed herein in October 1981.

CCA incorrectly asserts that this case brings this court a fully developed record relating the constitutional issues.

The primary issue presented by CCA throughout this case is whether all (or some) of CCA'S foreign operations were part of its unitary business. CCA operated in 7 foreign countries through 19 subsidiaries. (CT 194-95.) Many pages of exhibits and evidentiary facts

were received and evaluated by four California judges on two courts who unanimously concluded that such operations were in fact part of CCA'S unitary business. The trial court specifically found "contributions and dependencies" requiring use of formula apportionment and that CCA failed to demonstrate any "unreasonable result" from use of the formula (Jurisdictional Statement [hereinafter J.S.], p. A-30.)

In its statement of the issues before this Court CCA assumes facts contrary to those determined by the California courts. Thus CCA is apparently asking this Court to reexamine the evidence and make factual determinations contrary to those of the lower courts. Such a factual reexamination is certainly not appropriately undertaken in tandem with three entirely separate cases

-- as CCA'S motion requests. FTB believes it should not be undertaken by this Court at all.

The primary evidence presented in this case bearing on the constitutional issues consisted of testimony of five witnesses.[1/] Contrary to CCA'S representations this testimony and the inferences to be drawn therefrom and effect thereof were strongly disputed by appellee. The trial court limited the testimony of three of the witnesses to a comparison of Colombia with California operations. (CT 146.) The trial court rejected such testimony, holding that "CCA has failed in its proof to

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1. One witness testified orally. The parties stipulated to the testimony of four other witnesses. Under California law the effect is the same as if they had testified orally.

demonstrate that the application of formula apportionment would deny it due process." and "similarly, application of formula apportionment would not violate the commerce clause." (J.S. p. A-31.)

This case was tried under California rules of evidence, burden of proof and scope of review. Such California law similarly controls the facts to be considered on appeal therefrom. Under California law, a trial court determination contrary to testimony of a witness precludes consideration of such testimony on appeal. CCA had the opportunity to request Findings of Fact, but chose not to do so. (J. S., p. A-31.) Therefore, all facts must be considered to have been found against the appellant, CCA.

The testimony of CCA'S witnesses on which CCA relied at trial, on constitutional issues, was rejected by the factual determinations of the trial court that CCA failed to carry its burden of proving unconstitutionality. Therefore such testimony simply cannot properly be used on appeal.

CCA in its Jurisdictional Statement also refers to statements totally outside the record -- which were never offered in evidence at trial -- to try to establish certain facts on which it now bases arguments of unconstitutionality. This too is improper. The consideration of this appeal should be solely upon the evidence presented to the trial court, not upon the out-of-court statements or writings which CCA merely refers to in its arguments. Nor should

the resolution of this case be based on any evidence presented in other cases.

This appeal involves only activities during 1963, 1964 and 1965 in Holland, Mexico, Colombia and Venezuela.[2/] Most testimony here applies solely to CCA'S operations. The trial court limited the use of much of the testimony. (CT 146.) FTB is not familiar with the records or details of the other three cases, but submits that it is highly

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2. CCA also did business in Germany, Austria and Italy. However, under CCA'S own calculations (J. S., p. 11), CCA'S California tax was reduced, not increased, by their inclusion in the unitary business. Thus, CCA was benefitted, not injured, and cannot complain of any unconstitutionality thereby. The Panama subsidiary, a holding company, was not considered part of the unitary business. This also illustrates the fairness of California, which includes unitary activities where they reduce tax as well as those which increase tax. Tax assessments of under $16,000 for '63', $34,000 for '64' and $23,000 for '65' are in issue here.

doubtful that the respective records show that the CCA evidence is relevant and material to the determination of those cases. Further, such consideration of evidence in other cases would deprive opponents of the right to cross examination and violate universal rules of evidence and due process.

Because of the substantial changes in the economic and political relationships between various countries and areas of the world since the early 1960's, it is doubtful that determinations based on the facts of this case will have any substantial value for future cases.

CCA appears to concede that this case boils down to a question whether it can require California to tax it based on its own separate accounting methods (See Brief in Opposition to

Motion to Dismiss, p. 3.) It totally ignores the thorough analysis and clear language of this court in Mobil Oil Corp. v. Vermont (1980) 445 U.S. 425 (Id., p.4) and asks this court to speculate about situations not before the court. (Id., p. 5.)

This case involves a relatively small amount of tax arising from activities in a single type of business (paperboard) in four countries, at least three of which have developed and changed substantially in the almost two decades since the three years in issue. It should be resolved on its own facts, which were found against CCA below. It is of little value for future guidance.

CONCLUSION

Probable jurisdiction should NOT be noted. This Court in Mobil has recently set out the guidelines for state income taxation of foreign unitary businesses. Following these guidelines, four judges have unanimously agreed that the evidence before the court showed that CCA'S foreign subsidiaries were part of its unitary business and did not establish that formula apportionment violated CCA'S constitutional rights. This case would be of little precedential value. The Motion to Dismiss or Affirm should be granted.

Should the court be inclined to note probable jurisdiction: (a) it should consider it only on the evidence properly presented in the trial court, and usable on appeal under the California rules of evidence, burden of proof and scope of

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CERTIFICATE OF SERVICE

I, Neal J. Gobar, one of the attorneys for the Franchise Tax Board, appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of November, 1981, I served copies of the foregoing Opposition to Appellant's Motion to Note Probable Jurisdiction and Hear in Tandem with Other Cases on several parties thereto, as follows:

On the Container Corporation of America, appellant, by mailing three copies in a duly addressed envelope, with first-class postage prepaid, to its attorneys of record, as follows:

Franklin C. Latcham
Counsel of Record
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San Francisco, California 94105

It is further certified that all parties required to be served have been served in accordance with Supreme Court Rule 28.

NEAL J. GOBAR
Deputy Attorney General

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Franchise Tax Board